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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES and MONTGOMERY WARD & CO., INCORPORATED, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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QUESTIONS PRESENTED

1. Whether United States Government officials may avoid the specific remedial provisions of the Trade Agreements Act of 1979, including the statutorily mandated assessment of antidumping duties following proceedings on the public record where representatives of the domestic industry and labor may participate as a matter of right and thereafter seek judicial review (19 U.S.C. §§ 1675(a), (d); 1516a(a)(2)), by secretly entering into bilateral settlement agreements with representatives of importing interests under a claimed general compromise authority (19 U.S.C. § 1617) which had its conceptual origin during the Civil War and which was enacted for the purpose of maximizing the revenues of the United States.

2. Whether the Court of International Trade may review agreements between the United States and importers compromising potential Government claims for antidumping duties, when the agreements are claimed to have been negotiated and executed by United States Government officials in bad faith, on the basis of political and other irrelevant considerations, in complete abrogation of the enforcement responsibilities of the Department of Commerce under the antidumping law.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, Zenith Radio Corporation,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals entered in this proceeding on March 11, 1982.

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (App. A, *infra*, 1a-20a) is reported at 673 F.2d 1254 (1982). That opinion reversed orders of the United States Court of International Trade entered on May 13, 1981 (App. B, *infra*, 21a-26a) and June 18, 1981 (App. C, *infra*, 27a). The order of May 13, 1981 is re-

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[1] Petitioner has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

ported at 15 Cust. Bull. & Dec. No. 23, 106 (1981); the order of June 18, 1981 is not reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 11, 1982. A timely petition for rehearing was denied (Judge Miller dissenting) on May 13, 1982 (App. D, *infra*, 29a-30a), and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1256.

STATUTES INVOLVED

The relevant provisions of the Antidumping Act of 1921, as amended, the Tariff Act of 1930, as amended, the Trade Agreements Act of 1979, and 28 U.S.C. are set forth in a statutory appendix (App. E, *infra*, 31a-45a).

STATEMENT OF THE CASE

Background

Dumping—whether of Japanese television receivers, which this case involves, or any other imported merchandise—is the act of selling imported goods in the country of importation at less than the market price (or below the cost of production) in the home market. When it is practiced on a scale that is injurious to an industry in the importing country, dumping is universally recognized and condemned as an unfair trade practice by most civilized nations. Responsible enforcement of the antidumping law, mandated by the Trade Agreements Act of 1979, is indisputably one of our nation's most vital means of combating unfair international trade practices that have

decimated important targeted industries in the United States over the past decade.[2]

In 1979, after investigating the dismally poor record of the Treasury Department in administering the Antidumping Act of 1921—with respect to products in general and with respect to Japanese television receivers in particular—Congress enacted major procedural reforms mandating improved enforcement.[3] Among other things, Congress provided for a totally new framework for administrative and judicial review, designed to pre-

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[2] The clear purpose of our antidumping law is to provide for the assessment of additional duties designed to offset the margin of unfair pricing, or dumping, of imported merchandise. *See C. J. Tower & Sons* v. *United States*, 21 CCPA 417, 424-26, T.D. 46943 (1934). This law, originally the Antidumping Act of 1921, was codified as 19 U.S.C. § 160-173. Effective January 1, 1980, the "Antidumping Act" was replaced when the essential provisions of that law were incorporated in the Tariff Act of 1930, as amended (codified in 19 U.S.C. §§ 1673-1673i, 1677-1677b). Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 107, 106, 101, 93 Stat. 144 (1979). Dumping findings in effect on January 1, 1980 remained in effect beyond that date, "subject to review under [the newly added] section 751 of the Tariff Act of 1930 [19 U.S.C. § 1675]." Trade Agreements Act of 1979, section 106(a).

[3] Congress had learned that extensive and unconscionable delays in the assessment process, an inadequate desire by Treasury to assess the proper amount of duties due and an inadequate statutory procedure for judicial review by domestic interests frustrated the legislative intention that domestic industry and labor be protected against dumped imports. *See, e.g., Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 13, 17, 25, 34, 93, 106, 107, 245, 325, 328-30, 331-34, 337-38, 395, 426, 623, 630-32, 646-49 (1979); *Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 207-11, 284-85 (1979).

vent further ineffectual *ex parte* determinations of antidumping duties and to assure the protection of the rights of domestic industry and labor—*i.e.*, the intended beneficiaries of our antidumping legislation. Thus, Congress (a) mandated that such parties be permitted to participate in the administrative process by which the amount of antidumping duties to be assessed is determined and (b) established the right of such parties to judicial review.[4]

Effective January 1, 1980, the determination of antidumping duties on entries of merchandise subject to a finding of dumping and not assessed with antidumping duties as of that date became governed by the system of administrative and judicial review required by sections 751 and 516A. Additionally, Congress persuaded the Executive Branch to reorganize its trade law enforcement function—effective January 2, 1980—so as to transfer the responsibility for administering the antidumping and countervailing duty laws from the Treasury Department to the Commerce Department.[5]

Against this background, in early 1980, U.S. Government officials—without the knowledge or participation of

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[4] Trade Agreements Act of 1979, section 101 (adding section 751(a), (d) to the Tariff Act of 1930 [19 U.S.C. § 1675(a), (d)], section 1001 (adding section 516A to the Tariff Act of 1930 [19 U.S.C. § 1516a]), and section 1002(b)(3). *See H.R. Rep. No. 96-317*, 96th Cong., 1st Sess. 69-72, 179-83 (1979); *S. Rep. No. 96-249*, 96th Cong., 1st Sess. 75-77, 79-81, 244-56 (1979).

[5] *See, e.g., H.R. Rep. No. 96-585*, 96th Cong., 1st Sess. 6-7 (1979); *S. Rep. No. 96-402*, 96th Cong., 1st Sess. 12, 23-24 (1979); *Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 174-75, 186 (1979); Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979); Exec. Order 12188, 45 Fed. Reg. 989 (1980).

domestic television interests—engaged in secret negotiations with Japanese Government officials, Japanese television manufacturers, and importers of Japanese television receivers for the purpose of disposing of the question of antidumping duty liability on approximately $2 billion worth of Japanese television receivers imported into the United States during most of the 1970's.[6] These negotiations culminated in agreements, entered into on or about April 28, 1980, between the United States and various importers, providing for no antidumping duty assessments on imports made through March 31, 1979, but for lump sum settlement payments to the Government totalling approximately $70 million. The Commerce Department's General Counsel publicly announced at the time that the agreements were permitted by the general compromise authority of section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617). No explanation was given, however, for the failure of the Commerce Depart-

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[6] A finding of dumping with respect to Japanese television receivers was published by the Secretary of the Treasury in March 1971, after he made a determination that such merchandise was being sold at less than fair value and after the Tariff Commission (now, International Trade Commission) made a determination that the dumping of such merchandise was injuring a domestic industry. T.D. 71-76, 36 Fed. Reg. 4597 (1971). The publication of this finding (which is still in effect) required the ascertainment of antidumping duty on all importations of Japanese television receivers and the assessment of antidumping duty thus ascertained. Over the years that followed the publication of the finding, the antidumping law was not significantly enforced. By the end of 1979, there existed a backlog of over five years worth of unliquidated (unassessed) entries. Antidumping duties which were assessed in the liquidation of earlier entries were, for the most part, not collected; moreover, many of those duty determinations were based on false invoices which masked the true margins of dumping.

ment to follow the specific procedures of the new Trade Agreements Act.[7]

Proceedings in the Trial Court

On May 28, 1980, petitioner, a domestic manufacturer of television receivers, commenced an action against the United States in the United States Customs Court (now, United States Court of International Trade), for the purpose of setting aside the settlement agreements.[8] Petitioner pleaded two causes of action: first, that the settlement agreements were *ultra vires*, beyond the authority of section 617, and in defiance of the congressional will expressed in sections 751 and 516A; and second, that, in any event, the agreements were negotiated and entered into by United States Government officials in bad faith.

In December 1980, the trial court, finding that petitioner had made a strong preliminary showing of bad faith on

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[7] However, in a private memorandum to the Secretary of Commerce, dated April 28, 1980, the General Counsel made the following admission:

> This case, of course, need not be settled. It could be processed and litigated through the normal processes. Normal processing, it may be argued, would be more faithful to the requirements and spirit of the new Antidumping Law. It can also be seen as important to the integrity of the process; settlement can conversely be characterized as inconsistent with the objectives and procedures of the new law. *These are valid points.* [Emphasis added.]

Administrative Record Doc. No. EE at 8.

[8] An amended complaint was filed on November 3, 1980 (App. F, *infra*, 47a-88a), invoking the jurisdiction of the court alternatively under 28 U.S.C. § 1581(c) and 28 U.S.C. § 1581(i), as added by the Customs Courts Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1727, 1728 (1980). Subsequently, the Government expressly conceded and the trial court found that subject matter jurisdiction exists under 28 U.S.C. § 1581(i). *See Zenith Radio Corporation* v. *United States*, 505 F. Supp. 216 (CIT 1980) (App. G, *infra*, 89a-96a (*esp.* 91a)).

the part of Government officials who negotiated and executed the settlement agreements, preliminarily enjoined the implementation of the settlement agreements, *Zenith Radio Corporation* v. *United States*, 505 F. Supp. 216 (CIT 1980) (App. G, *infra*, at 92a-93a), and permitted the petitioner to engage in discovery against the Government, *Id.* v. *Id.*, 1 CIT 59, Slip Op. 80-11, 15 Cust. Bull. & Dec. No. 1, 29 (1980) (App. H, *infra*, 97a-98a).[9] On February 27, 1981, the trial court awarded summary judgment to the Government on petitioner's first cause of action. *Zenith Radio Corporation* v. *United States*, 509 F. Supp. 1282 (CIT 1981) (App. I, *infra*, 99a-109a).[10]

On May 13, 1981, the trial court issued a comprehensive discovery order, in which it directed the Government to make numerous documents available to petitioner's coun-

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[9] The Government did not exercise its statutory right under 28 U.S.C. § 1541(c) to appeal from the preliminary injunction.

[10] The trial court found no repugnancy between the new, specific Trade Agreements Act amendments and the general compromise authority in section 617, because of its view that "[a]ny person adversely affected by the decision to settle may then seek judicial review of the Secretary's action." App. I, *infra*, at 108a. The court continued: "Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures do not frustrate the Congressional purpose underlying section 751." *Id.*

This decision, which was on just one of petitioner's claims, was not final and was not appealable. *See, e.g.*, Rule 54(b), Rules of the United States Court of International Trade. As petitioner later advised the Court of Customs and Patent Appeals in its petition for rehearing at 2, "it has always been . . . [petitioner's] intention to take an appeal from any portion of the . . . [trial] court's final decision and judgment, once issued, which rejects our contention that the Secretary of Commerce had no statutory authority to enter into the settlements."

sel, under terms of a protective order (App. B, *infra*, 21a-26a). Included among these documents were certain files compiled by the Government, relating to Montgomery Ward & Co., Incorporated ("Wards"), an importer of Japanese television receivers who, several weeks earlier, had sought and obtained permission to intervene in the underlying litigation for the limited purpose of opposing the Government's production of such files, which, according to Wards, contained its confidential business information.

After its motion for rehearing was denied on June 18, 1981 (App. C, *infra*, 27a), Wards filed an appeal with the Court of Customs and Patent Appeals from the May 13 and June 18, 1981 orders, to the extent that they related to Wards' documents. On July 7, 1981, the Court of Customs and Patent Appeals issued an order staying the trial court's discovery order pending appeal insofar as that order related to the production of the Wards file.[11]

While the Wards appeal was pending, the underlying litigation continued: the Government produced many documents, pursuant to the trial court's discovery order, and numerous Government and former Government officials were deposed. Information obtained from these documents and depositions has been highly probative of the bad faith which petitioner has alleged.

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[11] The appellate court's stay order also provided that "absent contrary notice, this appeal will be heard without the necessity of filing a transcript [of the voluminous record—including numerous briefs and exhibits] and without oral argument." No contrary notice was ever issued and the appeal was heard and determined without a transcript or oral argument.

Decision of the Court of Customs and Patent Appeals

The issue raised by Wards' appeal of the trial court's discovery orders was whether that court abused its discretion in ordering the Government to make available to petitioner's counsel, under the terms of a protective order, the Wards file.[12]

In its decision of March 11, 1982, the Court of Customs and Patent Appeals determined that it had jurisdiction over the appeal. The court proceeded to hold, *sua sponte*—without oral argument, without briefing on point, without a printed transcript, and without any of the revealing discovery documents—(a) that the Secretary of Commerce had clear authority to enter into the subject settlements by virtue of section 617 of the Tariff Act and Reorganization Plan No. 3 of 1979 and (b) that petitioner's claim of bad faith was essentially nonjusticiable since the Secretary's decision to settle was action committed by law (under section 617) to agency discretion and not judicially reviewable. The court concluded by reversing the trial court's discovery order and remanding with directions to dismiss the entire action for lack of subject matter jurisdiction.[13]

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[12] Petitioner also raised the issue of whether the Court of Customs and Patent Appeals had jurisdiction over the appeal. The Wards documents were not claimed to be and were not privileged. Had the Government produced the documents to petitioner's counsel under terms of a protective order, Wards would not have experienced any hardship.

[13] The petition for rehearing filed by petitioner was denied (although in the order on rehearing (a) it was noted that Judge Miller would grant rehearing and (b) the original opinion was modified, but not materially). *See* App. D, *infra*, at 29a-30a.

REASONS FOR GRANTING THE PETITION

This Case Presents Important Questions Of Federal Statutory And Administrative Law.

As Judge Maletz of the Court of International Trade observed in his recent ruling denying the Government's motion to dissolve the preliminary injunction in this case, "[there is no] doubt that important and novel questions of statutory and administrative law are presented for Supreme Court review." *Zenith Radio Corporation* v. *United States*, 3 CIT ____, Slip Op. 82-51 (June 29, 1982) (App. J, *infra*, 111a-112a). The importance of these questions extends far beyond the petitioner and those involved in the television industry.

1. By ruling, in effect, that the Executive Branch may evade the specific provisions of sections 751 and 516A through exclusive reliance on the general compromise authority of section 617, the Court of Customs and Patent Appeals has threatened the effectiveness of the carefully conceived and articulated provisions of the Trade Agreements Act of 1979 which were designed to inhibit or neutralize unfair international trade practices and to prevent the abuses which had plagued the administration of the Antidumping Act from continuing. This vital issue was decided without its having been presented on appeal, without its having been briefed, and without its having been argued. The appeals court simply disposed of the question without analysis or elaboration, stating that "[t]he authority for settlement of antidumping proceedings is provided by section 617* * *." App. A, *infra*, at 9a-10a.

However, as noted, sections 751 and 516A were added by the Trade Agreements Act of 1979 in response to extreme criticism of the Treasury Department's adminis-

tration of the antidumping law. In these two sections, Congress deliberately gave domestic producers and labor interests an unqualified right to participate in the antidumping duty (and countervailing duty) determination process and to obtain judicial review of determinations which they believed were unlawful.

On the other hand, section 617 was never even considered by Congress during its deliberations over the Trade Agreements Act; it was never perceived as an enforcement tool under the antidumping law and was never utilized by the Treasury Department to settle claims arising under the antidumping law.[14] Rather, an examination of the history of section 617 reveals that it had a limited purpose—to maximize the revenues when the collectability of a mature Government claim was in

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[14] *See, e.g.*, letter from the Honorable Charles A. Vanik, Chairman of the Subcommittee on Trade of the House Ways and Means Committee, dated March 28, 1980, to a Commerce Department official, in which the following was stated:

> * * * I would point out that at no time during the consideration of the Trade Agreements Act of 1979 did we contemplate the possibility of granting the administering authority the power to settle claims. On the contrary, many of the amendments made to the dumping law by the Trade Agreements Act clearly demonstrate the Congressional intent to restrict the discretionary authority of the Department of Commerce in administering the law. An unlimited authority to settle claims would nullify the effect of these restrictions.
>
> Absent clear legal authority to settle, any act of compromise could, in my judgment, place the decision maker in a position of extreme personal risk as to his personal liability to those who may be adversely affected by the decision.
>
> For the above reasons, I am opposed to any settlement of dumping duties which takes place outside the purview of a court proceeding. As you will recall from our recent meeting, other members of the Subcommittee join me in this view.

Appendix F to petitioner's petition for rehearing before the Court of Customs and Patent Appeals.

doubt.[15] The ruling of the Court of Customs and Patent Appeals, which permits section 617 to be used as a vehicle for disposing of questions of antidumping duty liability without domestic industry participation or judicial review, is simply incompatible with the recent congressional enactments and should be reviewed by this Court.

2. In determining *sua sponte*, in a non-party's appeal from a discovery order, that the Secretary of Commerce's decision to compromise was not subject to judicial scrutiny, the Court of Customs and Patent Appeals was unaware of most of the massive evidence of bad faith that petitioner had compiled and was uninterested in that which had been brought to its attention. The court's

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[15] Section 617 had its conceptual origin in section 10 of the Act of March 3, 1863, 12 Stat. 737, 740 (subsequently codified as part of Rev. Stat. § 3469). Section 10 was enacted as part of legislation designed to raise and protect the revenues which were needed to finance the cost of the Civil War. *See* Smith, *Customs Valuation in the United States* 102 *et seq.* (1948); Taussig, *The Tariff History of the United States* 154 *et seq.*, *esp.* 160 (8th ed. 1931; 1967 reprint); U.S. Treasury, *Annual Report (1862)* [Sen. Ex. Doc. No. 1, 37th Cong., 3d Sess. 130-38 (1863)]. Specifically, section 10 was enacted "for the better ascertainment and realization of the *value* of claims in the course of collection." 16 Op. Att'y Gen. 617 (1879) (emphasis in original); *see also* 61 Cong. Globe 906 (1863) (remarks of Senator Fessenden); 12 Op. Att'y Gen. 543, 543-44 (1868); 36 Op. Att'y Gen. 40, 55 (1929). The statute was not blanket authority to settle anything which might be loosely called a claim, on any terms whatsoever. *See, e.g.*, 16 Op. Att'y Gen. 384 (1879); 21 Op. Att'y Gen. 361 (1896). Indeed, because of its extreme concern for revenue protection, Congress insisted on separate and independent statements or opinions before the Secretary of the Treasury could compromise a claim. *See United States* v. *George*, 25 Fed. Cas. 1277 (C.C.S.D.N.Y. 1869); 61 Cong. Globe 906 (1863) (colloquy between Senators Grimes and Fessenden).

decision was based on its view that the Secretary's decision to compromise under section 617 was action committed by law to agency discretion and not reviewable since, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), "there is no law to apply."

We believe that the lower court's reliance on the criticized *Overton Park* dictum[16] led to a result which this Court could never have intended and which, because of its importance to administrative law in general, should now be reviewed by this Court. Clearly, this Court has left the door open for judicial review—even in instances where extraordinary discretion has been conferred on an agency—when an agency completely abrogates its enforcement responsibilities or when the agency's decision would be "plainly beyond the bounds of the Act [or] clearly defiant of the Act." *Dunlop* v. *Bachowski*, 421 U.S. 560, 574 (1975).

Here, the actions of the Secretary of Commerce and his advisors have been in clear defiance of the congressional will and have rested on "considerations that Congress could not have intended to make relevant." *See Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1966) (Judge Friendly, quoting from an opinion of Judge Learned Hand). Documents from the Government's files and sworn deposition testimony reveal: (a) the Government's continuing

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[16] See, e.g., Davis, *Administrative Law Treatise* § 28.16 (Supp. 1982) at 508 ("The idea that [administrative] action is unreviewable whenever 'there is no law to apply' is contrary to much law that the Supreme Court could not have meant to reject."); *id.* at 512 ("The whole, huge batch of case law that is founded on the 'no law to apply' idea is unsound, contrary to the APA, a barrier to needed judicial review of discretionary action, and overripe for discontinuation.").

nonenforcement of the antidumping law with respect to Japanese television receivers—despite the dumping and injury determinations—and continuing drive to reduce duty liability unlawfully in response to relentless pressure from foreign interests, (b) the orchestration of "Commerce's" settlement by Executive Branch personnel outside the Commerce Department, (c) the deliberate reliance by Government officials on false invoice information in ascertaining antidumping duty and the deliberate understatement of antidumping duty liability by hundreds of millions of dollars in order to justify the settlement amounts, (d) the deliberate inclusion by Government officials of falsehoods in the settlement agreements, and (e) *the willingness of Government officials to engage in devious and deceptive conduct in an effort to accommodate the Japanese interests. See* petition for rehearing before the Court of Customs and Patent Appeals at 12-18 and record references cited therein.

One example of the last point may be found in notes provided by an official of the United States Trade Representative's office to the Commerce Department's General Counsel for the latter's use in secret negotiations with Japanese Government officials over the television dumping case.[17] The notes, which were prepared by an Assistant General Counsel of the Treasury Department during his secret discussions with Japanese officials, reveal that the Japanese manufacturers were very much concerned about being able to reimburse the importers

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[17] These notes were not made a part of the certified administrative record which was filed with the trial court. The Commerce Department official responsible for certifying the record acknowledged at his deposition that the notes should have been included and that the administrative record which was certified as complete was, in fact, incomplete.

for any monies paid as part of any settlement package.[18] Reimbursement of dumping duties has long been recognized as the equivalent of further dumping and has been prohibited by Treasury and Commerce Department practice and regulation. *See, e.g.*, 19 CFR § 353.55 (1981); 19 CFR § 153.49 (1979). The orchestration proposed by the U.S. official to circumvent our law is disclosed in the following excerpt from the notes:

> The MITI representatives then went down a list of specifics about the proposed agreement as follows:
>
> 1. They said that they are still disturbed about the payment of reimbursement by the manufacturer. I told them that I believed the best way by far for this to be done is through a private opinion generated by a lawyer for their use, with Treasury staying out of the matter. I said that my major reason for this perception is the desirability of not flushing this issue at the time the settlement is announced. I said one must realize that the reimbursement will probably be made public eventually, but I said that it would be much easier if it surfaced a month or two after the settlement is announced. At that time, I indicated that Mr. Mundheim [Treasury's General Counsel] would probably be well positioned to respond to a question about reimbursement by saying that he was aware that the manufacturers had a legal opinion saying that such reimbursement is not dumping, and that Mr. Mundheim is of the opinion that they have a sufficiently substantial argument to make it not worth the Treasury's while to pursue the issue with them. I also indicated that I am prepared to attempt to teach Mr. Gartland [an attorney for a

[18] There was also repeated concern that the monies paid not be termed dumping duties (because of pending antitrust litigation brought against the Japanese manufacturers). The settlement agreements reflect that the Japanese interests were accommodated.

Japanese manufacturer] a refined approach to the theory so that he may write such an opinion, and that if that were not possible, I nonetheless thought it important that some lawyer be obtained to write them that opinion. When they asked me what to do about everyone other than Mr. Gartland's client, I said that the way to handle that was to engage Mr. Gartland directly on behalf of MITI and then to take the opinion that he wrote and make it available as MITI's property to the manufacturer.

2. The MITI representatives asked me how one would go about making the reimbursement. I said that I believed it important not to make it public, but equally important, not to take extraordinary efforts to keep it secret. I said that in this manner one would not act as if the payment were wrong, thus causing people to believe the payment is wrong. At the conclusion of this point I explained that if I were in MITI's position I would suggest that each manufacturer write a letter to each of its importers saying the following: "I believe that a settlement by your company would be appropriate in this case on terms similar to those reached by so-and-so. Should you wish to make such a settlement, our company would be prepared to make reimbursement to you. Such payment is not in our opinion dumping because it is made in recognition of the fact that the delay in submitting information in this case may have damaged your company." The MITI representatives seemed to feel that this was a workable approach for them.[19]

Appendix L to petition for rehearing before the Court of Customs and Patent Appeals at L-35—L-37.

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[19] The notes also reflected other improper schemes and proposals (*e.g.*, promises to revoke the dumping finding, to conduct further "verifications" in a potentially ineffective manner, and to refuse to consider certain types of valid evidence of foreign market value).

The foregoing excerpt is offered solely as an example of the abundant evidence pointing to bad faith in the negotiation and execution of the settlement agreements. The rule of law flowing from the opinion below—that such evidence is immaterial and beyond the concerns of the judiciary—is a dangerous one. It is certainly not a rule which has ever been endorsed by this Court and should not be permitted to govern the disposition of this or any other significant trade controversy.

The Court of Customs and Patent Appeals in rendering its *sua sponte* determination on a non-party's appeal from a discovery order simply did not appreciate the complex factual and legal issues which were present in this litigation. That determination warrants this Court's attention. As shown above, the decision of the lower court poses a dangerous precedent of wide import to all domestic industry and labor. Having declared the judiciary to be impotent to consider and correct the flagrant abuses of administrative power revealed in the evidence marshalled in this case, the court below has in effect encouraged such abuses and has deprived adversely affected industries and labor of the redress Congress clearly sought to provide in the Trade Agreements Act of 1979 and the Customs Courts Act of 1980.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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